Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAESAR HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL H. BROMBERG
(Counsel of Record)
GARRETT B.M. DUARTE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

SCOTT A. SREBNICK
1899 South Bayshore Drive
Miami, FL 33133
(305) 285-9019

Counsel for Petitioner

QUESTION PRESENTED

Whether a criminal conviction may be sustained based upon otherwise insufficient evidence simply because the defendant has taken the stand and plausibly testified that he is *not* guilty?

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PETITION FOR A WRIT OF CERTIORARI

Caesar Hernandez ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is unreported.

JURISDICTION

The Eleventh Circuit entered judgment on August 18, 1995. (App. 1a). Petitioner's petition for rehearing and rehearing *en banc* was denied on October 18, 1995. (App. 6a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

STATEMENT

This case presents a fundamental question of criminal procedure on which the courts of appeals are divided: whether a defendant may be convicted simply because he has taken the stand and plausibly denied guilt.

1. Petitioner was indicted under 21 U.S.C. § 841 on one count of possession of cocaine with intent to distribute and under 21 U.S.C. § 846 on one count of conspiracy to possess cocaine. (App. 20a-21a). At petitioner's second trial,[1] the Government presented no evidence that the petitioner bought or sold narcotics. Instead, the evidence presented by the Government showed that Jose Pereira Garcia, petitioner's brother-in-law, was the subject of a "reverse sting operation" by Drug Enforcement Administration ("DEA") agents. 1 Trans. 93-94. After negotiating with Pereira, undercover agents agreed to deliver twenty kilograms of cocaine to him. On September 5, 1995, they placed the cocaine in a closed box in the rear of a government-owned Chevrolet Blazer, drove the Blazer to the shoe store operated by Pereira, and gave Pereira the keys. 1 Trans. 40-49, 89-95. The DEA agents planned to follow Pereira as he distributed the cocaine and identify the other individuals involved in his drug distribution operation. 1 Trans. 66.

Pereira, however, never took actual possession of the Blazer. Instead, petitioner — who was unknown to DEA and whom DEA agents did not recognize (1 Trans. 64-65, 73) — emerged from the shoe store, stepped into the Blazer, and drove it away. After

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[1] The first trial ended in a mistrial because the prosecutor improperly suggested to the jury that petitioner would testify. (App. 15a-19a). Unless otherwise noted, all references are to the second trial, which began on December 13, 1993.

petitioner turned left several blocks north of the shoe store, DEA agents concluded that he was fleeing. The seven or eight unmarked cars following petitioner converged, and petitioner was arrested. 1 Trans. 39-49, 88-101.

Although the Government failed to present any evidence that petitioner knew of the cocaine concealed in the Blazer and, indeed, established that petitioner did not have any opportunity to discover the cocaine, 1 Trans. 46, 73-74, 108, the district court denied petitioner's motion at the close of the Government's case for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. 2 Trans. 29.

2. Petitioner testified in his own defense. 2 Trans. 36. He stated that he did not know of the cocaine concealed in the Blazer.[2] 2 Trans. 98. Petitioner testified that on September 5, 1991 Pereira called and asked him to come to the shoe store. 2 Trans. 67. Petitioner assumed that Pereira wanted help with customers and put on a tie. 2 Trans. 67-68. At the store, without mentioning the contents of the Blazer, Pereira gave petitioner the keys and asked him to "take the car to the home." 2 Trans. 71-72. Petitioner went to the vehicle, drove it north toward his home, and then realized that Pereira may have wanted the Blazer delivered to Pereira's rather than petitioner's home. 2 Trans. 81-86. Petitioner then attempted to make a U-turn and return to the shoe store. However, due to rush hour traffic, he was forced to turn left into a residential area. 2 Trans. 89. Shortly thereafter, an unmarked vehicle forced petitioner off the road, and armed individuals whom petitioner later learned to be law enforcement officers arrested him. 2 Trans. 90-91, 101-03.

3. In rebuttal, the Government called Pereira, who by then had agreed to plead guilty and cooperate with the Government.

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[2] Petitioner also denied any knowledge that Pereira was involved in drug trafficking. Although petitioner suspected Pereira of some illegal activity — on several occasions in the spring of 1991 Pereira had asked petitioner to count large sums of money — petitioner thought his brother-in-law a thief, not a drug dealer. 2 Trans. 47-48, 53-57.

2 Trans. 182, 210-11. Pereira testified that he never told petitioner about his (Pereira's) drug trafficking and, in fact, tried to conceal that activity from petitioner by leading petitioner to believe that he was a thief. 2 Trans. 219-24. Pereira also stated that on September 5, 1991, after attempting to contact another relative, he asked petitioner to come to the shoe store. 2 Trans. 203. When petitioner arrived, Pereira gave him the keys to the Blazer and asked him to "park it outside the house." 2 Trans. 204. Finally, Pereira stated that neither he nor anyone else told petitioner of the cocaine in the Blazer. 2 Trans. 215-16, 220-21.[3] This testimony was uncontroverted.

4. At the close of the evidence, petitioner renewed his motion for acquittal. The trial judge found no evidence of an agreement and dismissed the conspiracy count. 3 Trans. 10. However, though the Government's own witnesses established that no one told petitioner about the cocaine concealed in the Blazer and that petitioner had no opportunity to discover the cocaine, the judge allowed the possession count to go to the jury. 3 Trans. 11-13. The jury found petitioner guilty of possession of cocaine with intent to distribute. 4 Trans. 6.

The trial judge was troubled by the lack of evidence supporting the verdict. In his view, petitioner's motion for acquittal on the possession count presented a "very close call," 3 Trans. 11, and before sentencing, the trial judge *sua sponte* ordered the parties to request a transcript of the trial so that he could once again review the evidence in the record. 5 Trans. 1-2. After sentencing petitioner to 121 months imprisonment, the minimum sentence in the applicable guideline range, the trial judge permitted

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[3] After Pereira's substantially similar testimony at the first trial, *see* Transcript, *United States v. Hernandez*, No. 91-670-Cr-DLG, at 65-134 (S.D. Fla. June 25, 1992), the Government moved to reduce Pereira's sentence below the applicable guideline range and statutory minimum based upon his "valuable assistance," (App. 22a), thereby attesting to the truthfulness of his testimony. *See* United States Sentencing Commission, *Guidelines Manual* § 5K1.1(a)(2) (1994).

petitioner to remain free on bond pending appeal based on exceptional circumstances, including that petitioner had raised a substantial legal question "likely to result in a reversal." (App. 10a).

5. The Eleventh Circuit found that t' ɔ affirmative evidence in the record — petitioner's possession of the Blazer containing the concealed cocaine, his counting of money for his brother-in-law, and his supposed attempt to flee law enforcement officers — supported the *inference* that petitioner knew of the cocaine. (App. 2a-3a). The court did not, however, suggest that this circumstantial evidence was by itself sufficient to prove beyond a reasonable doubt petitioner's knowledge of the cocaine. Instead, the Court found the evidence sufficient to support the jury's verdict when combined with petitioner's testimony denying such knowledge. (App. 2a).

In the Eleventh Circuit's view, "the jury was entitled to disbelieve [defendant's] testimony and believe that the opposite of his story was true." (App. 2a (citation omitted)). The court reasoned that

> "where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense." *United States v. Brown*, [53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub nom. Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693)].

(App. 2a.) In *Brown*, the Eleventh Circuit held that, after viewing a defendant's demeanor on the stand, a jury is entitled to find the opposite of what the defendant testified and therefore able to convict any defendant who takes the stand and denies guilt. *See Brown*, 53 F.3d at 314-15. Issuance of the mandate was stayed pending resolution of this petition. (App. 4a).

ARGUMENT

This case raises a fundamental question of criminal procedure: whether a conviction that is not otherwise supported by sufficient

evidence may be sustained on the ground that the defendant testified and denied guilt. The Eleventh Circuit's answer was yes so long as the Government presents some corroborative evidence of guilt. In other words, in the Eleventh Circuit's view, in virtually every case the Government is likely to bring, a defendant's testimony *denying* guilt constitutes sufficient affirmative evidence to uphold a conviction. This sweeping rule conflicts with decisions of this Court and with decisions of at least five other circuits. It also undermines a key procedural safeguard designed to prevent unjust and erroneous convictions in the very cases where that safeguard is most needed. Accordingly, this case merits review.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER COURTS OF APPEALS.

The lower courts are divided over the proper weight to attach to a defendant's testimony denying guilt in assessing the sufficiency of the evidence in criminal cases. *See Stallings v. Tansy*, 28 F.3d 1018, 1023-24 (10th Cir. 1994) (noting disagreement among the circuits). Two courts of appeals — the Seventh Circuit and now the Eleventh Circuit — have held that a defendant's testimony denying guilt, by itself, is sufficient to establish the elements of an offense. *See United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), *petition for cert. filed sub. nom. Mullis v. United States*, 640 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693); *United States v. Zafiro*, 945 F.2d 881 (7th Cir. 1991), *aff'd on other grounds*, 113 S. Ct. 933 (1993). At least five other courts of appeals have taken a contrary position and held that such evidence is generally insufficient to sustain a criminal conviction. *See United States v. Aulicino*, 44 F.3d 1102, 1114 (2d Cir. 1995); *Stallings v. Tansy*, 28 F.3d at 1023-24; *United States v. Zeigler*, 994 F.2d 845, 849-50 (D.C. Cir. 1993); *United States v. Slone*, 601 F.2d 800, 804 (1979); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956).

1. The D.C. Circuit recently considered whether a conviction may be sustained, in a case where the proof was

otherwise insufficient, simply because the defendant testified at trial. In *United States v. Zeigler*, 994 F.2d at 848, the Government suggested that the court look beyond the defendant's literal testimony and find in her denial of guilt sufficient evidence to sustain her conviction. Writing for the court, Judge Randolph recognized that a witness' demeanor is part of the evidence before the jury and that under certain circumstances demeanor evidence may lead a reasonable jury to assume the opposite of what a defendant testifies. *See id.* at 848-49. He concluded, however, that because demeanor evidence cannot be reviewed by an appellate court, reliance upon such evidence is incompatible with appellate review:

> Demeanor evidence is not captured by the transcript; when the witness steps down, it is gone forever. An appellate court cannot evaluate it, and therefore cannot determine how a rational juror might have treated it.
>
> * * *
>
> Because we cannot evaluate demeanor, a decision along the lines the government proposes would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each such case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available — the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence — that juries sometimes get things wrong. *Jackson v. Virginia*, 443 U.S. [307, 317 (1979).]

Id. at 849. Recognizing that "[a]ppellate review of the sufficiency of evidence protects against wrongful convictions," the D.C. Circuit refused to "destroy the protection in cases in which defendants testify." *Id.* at 850.

In reaching this conclusion, the D.C. Circuit rejected the very rule applied by the Eleventh Circuit in the decision below — that "when the government has presented at least *some* evidence of guilt, an appellate court may add negative inferences from the defendant's testimony to sustain the conviction." *Zeigler*, 994 F.2d at 849-50. The D.C. Circuit rejected this rule because the court could find "no principled way of deciding when the Government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to fill the gaps." *Id.* at 850. For similar reasons, the D.C. Circuit also refused to "subscribe to the Seventh Circuit's analysis in *United States v. Zafiro*, 945 F.2d 881." *Id.*

The D.C. Circuit's decision in *Zeigler* drew heavily upon "Judge Learned Hand's famous *Dyer v. MacDougall* opinion (201 F.2d 265, 268-69 (2d Cir. 1952))." *Zeigler*, 994 F.2d at 848-49. Although *Dyer* was a civil case, the Second Circuit has extended its holding to criminal cases as well. *See, e.g., United States v. Aulicino*, 44 F.3d at 1114-15; *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984), *cert. denied sub nom. Buchwald v. United States*, 470 U.S. 1058 (1985); *United States v. Marchand*, 564 F.2d 983, 986 (2d Cir. 1977) (Friendly, J.), *cert. denied*, 434 U.S. 1015 (1978). For example, in *Aulicino*, the Government argued that the defendant's challenge to the sufficiency of the evidence against him was barred by his decision to testify at trial. The Second Circuit acknowledged that a defendant's testimony "may . . . add weight to the government's case" and in particular that a jury may use its disbelief of a defendant's testimony to supplement other evidence against that defendant. *Aulicino*, 44 F.3d at 1114. Nevertheless, the Second Circuit reaffirmed that "a verdict of guilty cannot properly be based solely on the defendant's denial of the charges and the jury's disbelief of his testimony." *Id.* at 1114-15.

Three other circuits have joined the Second and D.C. Circuits in refusing to uphold criminal convictions based upon the mere fact that the defendant testified denying guilt. In *Stallings v. Tansy*, 28 F.3d at 1023, the Tenth Circuit rejected the

Government's suggestion that the jury could have inferred that the habeas corpus petitioner there knew that he possessed stolen goods from disbelief of his testimony. In the Tenth Circuit's view, "The jury's disbelief of petitioner's testimony could not fill the gap left by the State's total lack of relevant evidence as to petitioner's guilty knowledge." *Id.* at 1024. The Third and Fifth Circuits have reached similar conclusions. *See United States v. Slone*, 601 F.2d at 804 ("While the jury was within its right to disbelieve the defendant's account, such disbelief, standing alone, is inadequate to meet the government's affirmative obligation to produce evidence to support each element of the charge."); *United States v. Pechenik*, 236 F.2d at 847 ("[D]isbelief does not supply proof that the defendant participated in, directed or knew that the books were kept incorrectly.") (citation omitted).

2. In contrast to the five circuits holding that disbelief of a defendant, standing alone, is not a sufficient basis on which to sustain a criminal conviction, two courts of appeals hold that criminal convictions may, as a general rule, be sustained on the basis of disbelief of a defendant's testimony. *See Brown*, 53 F.2d 312; *United States v. Zafiro*, 945 F.2d 881.

In *United States v. Zafiro*, 945 F.2d 881 (Posner, J.), the Seventh Circuit declined to consider whether the evidence presented by the Government was sufficient to sustain a criminal conviction. Instead, the court noted that the defendant had testified and held that "on the basis of her demeanor" and the otherwise insufficient evidence in that case the jury was entitled to convict her. *See* 945 F.2d at 888. In so doing, the Seventh Circuit noted the concern expressed by the D.C. and Second Circuits that appellate courts are unable to review meaningfully verdicts based upon demeanor evidence. *See id.* (discussing *Dyer v. MacDougall*, 201 F.2d 265, and *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991)). Writing for the Seventh Circuit, then-Judge and now-Chief Judge Posner dismissed these concerns because, in his view, "if there is no evidence of guilt" other than a defendant's testimony denying guilt, the defendant would be entitled to a directed verdict at the end of the Government's case and would therefore have no reason to testify.

Id. The court did not, however, explain why where there is some, though insufficient, evidence of guilt and the district court erroneously refuses to direct acquittal at the close of the government's case, a jury should be permitted to convict a defendant based upon unreviewable demeanor evidence.

The decision below treated the sufficiency of disbelief of a defendant's testimony in similarly abbreviated fashion. The Eleventh Circuit simply asserted that where some evidence of guilt exists, "the defendant's testimony denying guilt, may establish, by itself, elements of the offense." (App. 2a (quotation omitted)). The Eleventh Circuit did not offer any principled justification for this assertion. The decision in *United States v. Brown*, 53 F.3d 312, upon which the court below relied, is equally cryptic. It asserts that, based upon the defendant's demeanor, a jury is entitled to find the opposite of what the defendant testified. *See Brown*, 53 F.3d at 314. The *Brown* opinion does not, however, attempt to distinguish *Zeigler*, *Dyer*, or any other decisions holding that mere disbelief of a defendant's testimony is not a sufficient basis for a judgment.[4]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

In *Nishikawa v. Dulles*, 356 U.S. 129 (1958), this Court reviewed the sufficiency of the evidence in a denaturalization

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[4] In addition, the Ninth Circuit has asserted — albeit in a case in which the evidence presented by the Government was sufficient to support a conviction — "that [w]hen the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude the opposite of his testimony is the truth." *United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). *But see United States v. Chase*, 503 F.2d 571, 573 n.4 (9th Cir. 1974) (A defendant's denials of guilt "could not be used to support a finding of fact where, for example, the only basis for drawing the opposite inference was demeanor."), *cert. denied*, 420 U.S. 948 (1975); *United States v. Cisneros*, 448 F.2d 298, 306 n.10 (9th Cir. 1971) (same).

proceeding. The defendant in that case, an American citizen of Japanese descent, testified that he was trapped in Japan before World War II, drafted after the war began, and coerced into joining the Japanese Air Force. The trial judge found based upon his disbelief of defendant's testimony that the defendant had voluntarily entered the Japanese armed forces and thereby abandoned his United States citizenship. *See Nishikawa*, 356 U.S. at 132-33. This Court reversed. In its view, the trial judge's "disbelief of petitioner's story of his motives and fears" could not "fill the evidentiary gap in the Government's case." *Id.* at 137.

Nishikawa reflects a long line of decisions by this Court. More than a hundred years ago, this Court held that "disbelief of [a witness'] testimony could not supply a want of proof." *Bunt v. Sierra Butte Gold Min. Co.*, 138 U.S. 483, 485 (1891). Since that time, the Supreme Court has repeatedly reaffirmed this rule.[5] *See, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986) ("[D]iscredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion.") (quotation omitted); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.") (citation omitted); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951) ("[D]isbelief of the engineer's testimony would not supply a want of proof.").

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[5] This Court has, however, recognized several exceptions to the rule that a judgment may not be sustained based upon disbelief of a witness' testimony. *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 (1993) (failure to offer true reasons for employment decision supports inference that the actual reason is impermissible); *Wright v. West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.) (treating inherently implausible and internally contradictory testimony as "affirmative evidence of guilt") (citation omitted). The court below did not suggest that any exception was applicable here.

The decision below rejected this rule and held as a general matter that a jury may find a defendant guilty beyond a reasonable doubt based upon disbelief of the defendant's testimony denying guilt. (App. 2a-3a). This ruling directly conflicts with *Nishikawa* and other decisions of this Court.

III. THE DECISION BELOW WAS ERRONEOUS.

The testimony of the Government's witnesses affirmatively established that petitioner was not told of and did not discover the cocaine DEA agents concealed in the Blazer. *See supra* pp. 2-4. Nevertheless, the Eleventh Circuit upheld the judgment below based upon petitioner's testimony that he did not know of the cocaine. (App. 2a-3a). The court did so by applying a rule of sweeping generality: that anytime there is "some corroborative evidence of guilt," a defendant's testimony denying guilt, by itself, supplies sufficient evidence of guilt to sustain a conviction. (App. 2a (quotation omitted)). This rule is irrational, unjustified, and violative of Due Process.

The decision below departs radically from traditional practice. Courts have not traditionally refused to scrutinize the sufficiency of the evidence in the record simply because a criminal defendant has testified. To the contrary, the traditional rule — exemplified in Judge Hand's decision in *Dyer v. MacDougall* — is that disbelief of a witness' or defendant's testimony, standing alone, is not sufficient to sustain a judgment. *See, e.g., Dyer v. MacDougall*, 201 F.2d at 268-69.[6] Traditional practice, of

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[6] *See also* 2 J. Wigmore, *Evidence* § 278, at 133 n.1 (J. Chadbourne rev. ed. 1979) ("A negative inference from disbelief of a party's testimony is not acceptable, though it may be theoretically sound.") (citation omitted); 9A C. Wright & A. Miller, *Federal Practice & Procedure*, § 2527, at 288 (2d ed. 1995) ("The party with the burden of proof does not make an issue for the jury's determination by relying on the hope that the jury will not trust the reliability of the witnesses."); Morgan, *Admissions*, 12 Wash. L. Rev. 181, 185-86 (1937) (observing that even in civil cases "mere disbelief of a party's evidence will not of itself sustain a finding of fact to the contrary"); Wellborn, *Demeanor*,

course, "provides the touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2339 (1994) (citations omitted); *see In re Winship*, 397 U.S. 358, 361-62 (1970). Accordingly, the Eleventh Circuit's departure from traditional practice "raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 114 S. Ct. at 2339.

The decision below does not offer any principled basis for departing from traditional appellate practice. Moreover, the justification offered in the decision upon which it primarily relies, *United States v. Brown*, is inadequate. In *Brown*, the Eleventh Circuit held that a defendant's testimony denying guilt is sufficient to sustain a criminal conviction because a jury, upon seeing a defendant's demeanor, is "entitled to believe [the defendant's] testimony and, in fact, to believe the opposite of what [the defendant] said." 53 F.3d at 314-15. The D.C. Circuit's critique of this reasoning is persuasive. Because demeanor evidence is not reflected in the appellate record, an appellate court cannot find demeanor evidence sufficient — or even probative — without first assuming that the jury correctly and rationally evaluated that evidence. *United States v. Zeigler*, 994 F.2d at 849. Such an assumption is, however, impermissible because it "contradicts the reason why appellate courts review convictions for sufficiency of evidence — that juries sometimes get things wrong." *Id.* at 849 (citation omitted); *see generally Jackson v. Virginia*, 443 U.S. 307 (1979).[7]

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76 Cornell L. Rev. 1075, 1101 & n.127 (1991) (observing that "cases citing this doctrine appear to be ubiquitous.")

[7] In addition, reliance on demeanor evidence is questionable in light of recent psychological studies. "Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying." Wellborn, *Demeanor*, 76 Cornell L. Rev. at 1088; *see also* Uviller, *Credence, Character and the Rules of Evidence*, 42 Duke L. J. 776, 787 (1993) ("[C]onsiderable data strongly suggest that the common faith in the telltale signs of prevarication is baseless.").

Nor can the decision below be salvaged by assuming that the jury disbelieved the petitioner because of inconsistent testimony or evidence other than demeanor. First, the Eleventh Circuit did not, and could not, find petitioner's testimony internally contradictory or inherently implausible. *See, e.g., Wright v. West*, 505 U.S. at 296 (opinion of Thomas, J.). Petitioner's testimony — that Pereira asked him to drive the Blazer in which the cocaine was concealed and that he did so without suspecting it contained cocaine or discovering the cocaine — was not only plausible; it was corroborated by the agents surveilling the Blazer and by government witness Pereira, the only witness who spoke with petitioner before he entered the Blazer. *See supra* pp. 2-4.

Second, even where a jury has a reasonable basis for finding that a defendant has fabricated testimony, that finding has only "modest probative value." *McCormick on Evidence* § 273, at 809 (3d ed. 1984). Fabrication of evidence indicates a party's "consciousness that his case is a weak or unfounded one." 2 Wigmore, *Evidence* § 278, at 133. While such consciousness is often associated with and therefore tends to show guilt, its probative value is limited because "an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs." *Id.* § 278, at 135 (quotation omitted); *see generally* J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* § 2.3, at 34-35 (1989).[8] Accordingly, courts and commentators have concluded that fabrication of evidence, like other conduct obstructing trial, "will not supply a want of proof of a particular fact essential to the proponent's case." *McCormick on Evidence* § 273, at 810 (footnote omitted); *see also id.* at 810 n.20 (citing

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[8] For example, here, even if the jury had credited the testimony of law enforcement agents that petitioner fled from their unmarked cars and concluded that petitioner fabricated his testimony to the contrary, *see supra* pp. 3, that conclusion would have only limited probative value for the simple reason that an innocent person would have had just as much reason to deny fleeing as a guilty one.

cases); J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* § 2.18, at 50-51 nn. 104-105 (same).

Finally, the rule applied in the decision below is fundamentally unfair. The rule significantly increases the risk of erroneous and unjust convictions. It applies to the cases in which it is most likely that an innocent person will be found guilty; those in which the evidence presented by the Government is insufficient to sustain a conviction.[9] By stripping defendants who testify in such cases of sufficiency review, the primary safeguard against irrational and improper verdicts, the decision below virtually ensures that more innocent persons will be erroneously and unjustly convicted. The decision below impermissibly burdens the right of criminal defendants to testify on their own behalf. Although the Constitution guarantees defendants that right, *see e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 49 (1987), the decision below in effect requires defendants who exercise that right to waive their constitutional right to have the government prove all elements of the offense charged beyond a reasonable doubt. Imposing such a penalty upon the exercise of a constitutional right is impermissible because it "cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965).

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[9] This is not to say that the *logic* of the opinion below applies only to this narrow range of cases. Quite the opposite is true. By the logic of the decision below, a jury should be able to convict a defendant based upon exculpatory testimony from any witness. Moreover, if disbelief of a witness, standing alone, is sufficient to establish the opposite of the witness' testimony in the criminal context, disbelief of a witness must be sufficient to sustain judgment in the civil context where a more lenient standard of proof is applied — a chain of logic that leads inevitably to the absurd conclusion that a civil litigant can avoid summary judgment simply by pointing to witnesses who deny the material elements of that party's case. *Cf. Dyer v. MacDougall*, 201 F.2d at 268-69.

IV. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE.

As the many cases and commentators addressing this issue demonstrate, *see supra* pp. 6-10, 12 n.6 questions concerning the weight and sufficiency of negative inferences based upon disbelief of a defendant's or witness' testimony arise frequently. Indeed, the Eleventh Circuit has addressed this issue at least three times in the last six months. *See United States v. Vasquez*, 53 F.3d 1216, 1225-26 (11th Cir. 1995); App. 2a-3a; *United States v. Brown*, 53 F.3d at 314-15. Moreover, the question presented by this case is of indisputable significance. The answer to this fundamental question of criminal procedure will not only determine the validity of many past judgments. It will also influence whether defendants in future trials risk testifying. The question presented by this case is therefore both important and recurring.[10]

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[10] The question presented in this case is similar to the first question presented in a petition currently pending before this Court. *See* Petition for Certiorari at 4-7, *Mullis v. United States*, 64 U.S.L.W. 3333 (U.S. Nov. 7, 1995) (No. 95-693). Although the *Mullis* petition seeks review of the Eleventh Circuit's decision in *Brown*, this petition presents a better vehicle for considering the Eleventh Circuit's blanket rule that disbelief of a defendant's testimony is sufficient to sustain in criminal conviction. First, in the *Mullis* case, the Eleventh Circuit specifically noted that "[t]he government's evidence was possibly enough to prove guilt beyond a reasonable doubt." *Brown*, 53 F.3d at 314. There was no such suggestion here. Second, the petition for certiorari in *Brown* failed to apprise this Court of either the conflict between the Eleventh Circuit's rule and this Court's decisions or the true depth of the conflict among the circuits. *Compare* Petition for Certiorari at 4-7, *Mullis v. United States with infra* pp. 6-10.

If, however, this Court grants the *Mullis* petition on the first question presented in that case, petitioner respectfully requests that the Court grant certiorari in this case and consolidate it with *Mullis*. In the alternative, petitioner requests that the Court hold this case pending any decision in the *Mullis* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL H. BROMBERG
(Counsel of Record)
GARRETT B.M. DUARTE
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

SCOTT A. SREBNICK
1899 South Bayshore Drive
Miami, FL 33133
(305) 285-9019

Counsel for Petitioner

December 1, 1995

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CEASAR HERNANDEZ,
Defendant-Appellant.

D.C. Docket No. 91-670 CR-DLG
(August 18, 1995)

Appeal from the United States District Court
for the Southern District of Florida

Before KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Caesar Hernandez appeals his conviction for possession of cocaine with intent to distribute. Hernandez asserts that the evidence was insufficient to sustain his conviction.*

To sustain a conviction for possession with intent to distribute, the government must show that Hernandez (1) knowingly (2) possessed cocaine (3) with intent to distribute. 21 U.S.C. § 841(a)(1). At trial, Hernandez' defense rested on his lack of

* Hernandez also argues that the prosecutor committed misconduct in closing argument and that the district court committed reversible error in its response to a question posed by the jury. We affirm without discussion Hernandez' conviction on these issues.

knowledge that there was cocaine in the Chevrolet Blazer that he was driving when he was arrested.

The government presented evidence supporting the inference of Hernandez' knowledge. Specifically, one government witness, Jose Lucio Pereira-Garcia (Pereira), testifying pursuant to a cooperation agreement, testified that Hernandez helped Pereira count money on several occasions. The aggregate amount of money counted was up to $1.5 million to $2 million. Pereira testified that he never paid Hernandez for doing a drug deal and that Hernandez did not know that Pereira was involved in narcotics trafficking.

When Hernandez was arrested he was the driver and sole occupant of a Chevrolet Blazer which had 20 kilograms of cocaine in it. The cocaine was put there as part of a reverse sting operation by the DEA. Pereira had called Hernandez and asked him to come get the Blazer and to drive it to his house. Pereira testified that he did not tell Hernandez that cocaine was in the Blazer.

Hernandez led agents in unmarked cars on a short, high speed chase through a residential neighborhood before he was stopped and arrested. Hernandez testified he did not see the blue lights or hear the sirens; so, he was not trying to flee from the agents. But, as this court has said, the jury was entitled to disbelieve Hernandez' testimony and believe that the opposite of his story was true. *United States v. Sharif*, 893 F.2d 1212, 1214 (11th Cir. 1990). And, "where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense." *United States v. Brown*, Slip Op. No. 93-8181, p. 2127 (11th Cir. 1995).

The evidence established that Hernandez was in sole possession of 20 kilograms of cocaine (having a retail value of $2 million), that on numerous occasions Hernandez counted large amounts of money with Pereira, and that Hernandez attempted to elude law enforcement agents. Given this evidence and Hernandez' testimony, which the jury was free to disbelieve, we

cannot say that reasonable jury could not find Hernandez guilty. The evidence is sufficient to sustain Hernandez' conviction.

AFFIRMED.

[Filed Nov. 6, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CEASAR HERNANDEZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of *Ceasar Hernandez* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of *Ceasar Hernandez* for (XX) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *1 December 1995*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

[Filed October 18, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4247

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CAESER HERNANDEZ,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, ____F.2d____).

Before: KRAVITCH, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR HERNANDEZ,

Defendant.

Case No. 91-0670-CR-GRAHAM

ORDER AND MEMORANDUM OPINION

THIS CAUSE came before the Court upon Defendant, Cesar Hernandez's ("Hernandez") Motion for Continued Bond Pending Appeal.

I. BACKGROUND

The Grand Jury charged Hernandez with a two count indictment. Count I charged Hernandez with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. Count II charged Hernandez with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). On September 10, 1991, Hernandez was released on a $25,000 Corporate Surety bond and a $100,000 Personal Surety Bond.[1]

On December 15, 1993, following the close of evidence, this Court granted Hernandez's Rule 29 motion to dismiss Count I of the indictment for the Government's failure to meet its burden of proof. On December 16, 1993, a jury found Hernandez guilty of intent to distribute 20 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). On April 20, 1994, this Court sentenced

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[1] On July 20, 1993, Magistrate Judge Linnea R. Johnson modified Hernandez's bond to release Lucille M. Pereira as a surety and reset a $150,000 Personal Surety Bond co-signed by Hernandez's wife.

Hernandez to 10 years imprisonment. Hernandez seeks to remain on bond pending appeal of his conviction.

II. DISCUSSION

Generally, a defendant may be released on bail pending appeal if the Court finds that the defendant does not pose a risk of flight or a danger to the community and that the appeal raises a substantial question of law or fact and is not interposed for the purposes of delay. 18 U.S.C. § 3143(b)(1). However, the Bail Reform Act of 1990 added another provision to section 3143 which mandates detention for persons convicted of crimes enumerated in § 3142(f)(1)(A), (B), and (C).[2] 18 U.S.C. § 3143(b)(2). The Bail Reform Act also added, however, a provision which provides that a person subject to mandatory detention under section 3143(b)(2) would be eligible for bail under section 3143(b)(1) if the judicial officer involved finds that it has been "clearly shown" that "there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c). Therefore, a defendant convicted of a crime enumerated in section 3142(f)(1)(A), (B), and (C) can be released on bail pending appeal if the Court finds the following:

1) that the defendant does not pose a risk of flight or a danger to the community;

---

[2] Section 3142(f)(1) states, in pertinent part:

> (1) upon motion of the attorney for the Government, in a case that involves--
>
> (A) a crime of violence;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
>
> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et. seq.), the Controlled Substance Import and Export act (21 U.S.C. 951 et seq.), or in the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) . . .

2) that the defendant's appeal raises a substantial question of law or fact; and

3) that exceptional reasons clearly exists that make detention inappropriate.

United States v. Pope, 794 F. Supp. 372 (S.D. Fla. 1992), *aff'd*, 993 F.2d 1533 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 279, 702 (1994). After holding two evidentiary hearings, this Court finds that Hernandez has met his burden of satisfying all three criteria necessary to warrant his continued release.

A. Risk of Flight or Danger to the Community

Hernandez has been on bond for 2 1/2 years. He has done everything the Court has asked of him and has complied with all the terms and conditions of his release. Moreover, on May 10, 1994, a United States Pretrial Services Officer issued a Release Status Report which states "[b]ased on the defendant's performance while on pretrial release, it is felt that the defendant is not likely to flee or pose a danger to the community." Accordingly, the Court finds that Hernandez does not pose a flight risk. 18 U.S.C. § 3143(b)(1)(A). However, based upon statements made by Hernandez's estranged wife, the Court was initially concerned whether Hernandez posed a danger to the community. However, after hearing evidence presented at two evidentiary hearings, this Court is convinced by a preponderance of the evidence that Hernandez does not pose a danger to the community.

B. Substantial Question of Law of Fact

The Eleventh Circuit has held that a "substantial question" is more than a showing that the appeal is not frivolous. It is a "close" question or one that very well could be decided the other way. *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985). Having heard the evidence presented at trial, this Court finds that it is a "close" call as to whether the government had met its burden of proof as the critical elements of the charge in Count II of the indictment. Accordingly, this Court finds that Hernandez

has raised a substantial question of law or fact likely to result in a reversal, or order for a new trial, or a sentence that does not include a term of imprisonment. 18 U.S.C. § 3143(b)(1)(B).

C. Exceptional Reasons

The third point to consider is whether or not "exceptional reasons" clearly exist to make detention inappropriate. The Second Circuit in *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991), provides a careful analysis of section 3145(c). In analyzing section 3145(c), the Second Circuit, found the language of the statute, case law, and legislative history unhelpful in determining what Congress meant by "exceptional reasons." Therefore, the Court was forced to make its own interpretation of the statute. In doing so, the Court stated:

> We do think that an unusual legal or factual question can be sufficient . . . to meet the test. On the other hand, a merely substantial question may be sufficient, in the presence of one or more remarkable and uncommon factors, to support a finding of exceptional reasons for the inappropriateness of detention. As in many things, a case by case evaluation is essential, and it is not our intention to foreclose district judges from the full exercise of discretion in these matters.

DiSomma, 951 F.2d at 497. The Second Circuit went on to hold that where a defendant mounts a direct and substantial challenge on appeal to the factual underpinnings of the element of the crime upon which his sole conviction stands or falls, in the absence of risk of flight or danger to the community, it is well within the district judge's discretion to find that exceptional reasons allow release of the defendant pending appeal. *Id.* at 498.

In the intent case, Hernandez is mounting a direct and substantial challenge on appeal to the factual underpinnings of the elements of the crime upon which his sole conviction stands or falls. Hernandez contends that the evidence does not support the knowledge and intent elements of the offence charged in Count II of the indictment. In fact, there was evidence presented at trial

in which Hernandez's brother-in-law, the main organizer and precipitator of the charged offense, testified that Hernandez was not aware that his "Ford Blazer" contained cocaine. Moreover, the Court has found that Hernandez poses no risk of flight and no danger to the community and has presented a substantial question on appeal. Accordingly, this Court finds that exceptional reasons clearly exists which makes mandatory detention inappropriate in this case.

III. CONCLUSION

Based on the foregoing discussion, the Court holds that Hernandez has met his burden of satisfying all three criteria for continued release on bail pending his appeal. Accordingly, Hernandez' motion for Continued Bond Pending Appeal is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of June, 1994.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

CEASAR HERNANDEZ

Reg. No. 45927-004	Chris Clark, Assistant U.S. Attorney
a/k/a Oscar Cabrera	Jerry Schreiber
(True Name)	19 West Flagler Street S-207
(Name of Defendant)	Miami, FL 33130, Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 91-670-CR-GRAHAM(02)

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____

[X] was found guilty on count(s) II of the Indictment after a plea of not guilty.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section:	21 U.S.C. § 841(a)(1) & 18 U.S.C. 2
Nature of Offense:	Possession with Intent to Distribute Cocaine
Date Offense Concluded:	9/5/91
Count Number(s):	II

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s)_____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) II of the Indictment, which shall be due [x] immediately [] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 262-63-9882

Defendant's Date of Birth: 2-3-63

Defendant's Mailing Address:
5430 S.W. 93 Avenue
Miami, FL 33165
(305) 261-1366

Defendant's Residence Address:
_____
_____

4-19-94
Date of Imposition of Sentence

/s/ Donald L. Graham
Signature of Judicial Officer

Donald L. Graham
U.S. District Judge
Name & Title of Judicial Officer

4-28-94
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CAESAR HERNANDEZ,

Defendant.

CASE NO. 91-670-CR-GRAHAM

ORDER DENYING MOTION FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL

THIS CAUSE came before the Court upon the Defendant's Motion for Judgment Acquittal or in the Alternative a New Trial. The Court having reviewed the issues at hand and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Defendant's Motion for Judgment of Acquittal or in the Alternative for a New Trial is Denied.

DONE AND ORDERED in Chambers, at Miami, Florida this 31st, day of January, 1994.

/s/ Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

Plaintiff,

v.

CESAR HERNANDEZ

Defendant.

Case No. 91-670-CR-GRAHAM

MEMORANDUM OPINION AND ORDER

THIS CAUSE came before the Court upon the Government's Motion for Reconsideration.

I. BACKGROUND

Defendant, Cesar Hernandez ("Defendant"), along with codefendant Jose Pereira-Garcia ("Pereira"), was charged in a two-count indictment with conspiracy and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1).

At Defendant's trial, the defense called Pereira as a witness. During Pereira's cross-examination, the prosecutor, in the midst of questioning the witness about whether Defendant had ever received money for helping the witness hide money or deliver cocaine, asked the following question: "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5, '89?". Transcript of Testimony Excerpt of Jose Pereira-Garcia at 4. Defense counsel objected to the question and moved for mistrial on the basis that the prosecutor's question implied Defendant must take the stand. The motion for mistrial was denied and the Court gave a cautionary

instruction to the jury that Defendant had no obligation to produce testimony.[3]

At the close of its case, the defense moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29(a), which the court denied. However, the court advised counsel that it would allow the case to go to the jury, but if Defendant were found guilty, then Defendant's motion for mistrial would be granted based upon the circumstantial nature of the case. The jury returned a verdict of guilty and the court declared a mistrial. This motion for reconsideration followed.

II. DISCUSSION

A. Motion for Reconsideration

In *United States v. Vicaria*, 963 F.2d 1412 (11th Cir. 1992), the eleventh circuit found that while motions for reconsideration of district court orders in criminal cases are not expressly authorized by the Federal Rules of Criminal Procedure, the Supreme Court has held that timely filing of such motions tolls the time for filing notices of appeal and the time begins to run again following disposition of the motion. *Id.* at 1413-14, *citing United States v. Dieter*, 429 U.S. 6 (1976); *United States v. Healy*, 376 U.S. 75 (1964). The court went on to find that "a motion for reconsideration in a criminal case must be filed within

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[3] The cautionary instruction given to the jury was as follows:

> Ladies and gentlemen, there was a question asked by the prosecutor. The question was "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5." If that "he" referred to Mr. Hernandez, as you have already been instructed, a defendant has no obligation whatsoever to present any testimony. That is the reason I sustained the objection, and you are to disregard any suggestion that question may convey. That is, that this defendant has to say something later, because he doesn't have to say anything, as I have told you previously, as I am telling you now, and if the circumstances suggest, I will tell you that later during the instruction phase. Trial Transcript at 7.

the period of time for filing a notice of appeal in order to extend the time for filing an appeal. (citation omitted). Therefore, in a criminal case, the government has thirty days in which to seek reconsideration of a final judgment or other appealable order." *Vicaria*, 963 F.2d at 1414.

Defendant argues that the Government's motion for reconsideration is procedurally improper. Relying on *Vicaria*, Defendant asserts that because this court granted a mistrial, not a new trial, the order is neither appealable nor a final judgment, and thus, the Government's motion for reconsideration is meritless. The Government counters that argument by asserting that the distinction between granting a mistrial or a new trial is purely semantic and does not govern in this case. This court agrees.

18 U.S.C. § 3731 allows the government to appeal in a criminal case "from a decision, judgment, or order of a district court dismissing an indictment or information granting a *new trial* after verdict or judgment . . ." (emphasis added). In the case at bar, the court entered an order granting Defendant's motion for mistrial after the jury returned a verdict of guilty. The effect of this order was to grant Defendant a new trial. Thus, this court will give its order granting mistrial its legal effect rather than be constrained by a label. *See United States v. Wilson*, 492 F.2d 1345 (3rd Circuit 1974), *rev'd on other grounds and remanded*, 420 U.S. 332 (1975). Since 18 U.S.C. § 3731 allows appeals from orders granting new trials and the Government filed its motion for reconsideration within the time period for filing a notice of appeal, the Government's motion for reconsideration is procedurally correct.

B. Motion for Mistrial

The test for determining whether there has been an impermissible comment upon a defendant's right not to testify at trial is "whether the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify." *United States v. Zielie*, 734 F.2d 1447, 1461, *cert. denied*, 469

U.S. 1189 (1985), *quoting United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977), *cert. denied*, 434 U.S. 902 (1977). When applying this standard, the court must look at the context in which the statement was made to determine the manifest intention of the speaker and its natural and necessary impact upon the jury. *United States v. Forrest*, 620 F.2d 446, 455 (5th Cir. 1980), *quoting Samuel v. United States*, 398 F.2d 964, 967 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969).

The Government argues that the prosecutor did not intend to comment on defendant's silence, but merely made a misstatement. The Government asserts that the question "As he will tell us later, he never got a promised fee for driving the cocaine away from your shoe store on September 5, '89?" does not support a finding of mistrial. The Government goes on to argue that even if this court were to find that the prosecutor impermissibly commented on Defendant's silence, this error was harmless. In support of its position, the government cites *United States v. Dorsey*, 819 F.2d 1055 (11th Cir. 1987), *cert. denied*, 486 U.S. 1025 (1988). During closing argument, the prosecutor in *Dorsey* referred to the defendant's testimony even though the defendant never testified. The court found that the prosecutor's comment was a "slip of the tongue" and harmless. *Id.* at 1061-62.

In the instant case, the rather pointed nature of the question implied that the Defendant would be testifying. While the prosecutor stated at sidebar that he did not intend to imply that Defendant would testify, the record as a whole is unclear as to the prosecutor's "manifest intent."

In any event, the court need not determine whether the prosecutor intended to comment upon Defendant's failure to testify since, under the facts of this case, the court finds that the jury would "necessarily and naturally" take this question as a comment on Defendant's failure to testify. Here, Pereira was a

cooperating individual[4] whose credibility was attested to by the Government. Pereira testified that Defendant had no knowledge of Pereira's involvement in any drug transactions - the only evidence which could have suggested Defendant's guilt. Indeed, the evidence presented by the Government against Defendant was so minimal that the court seriously considered granting Defendant's motion for judgment of acquittal pursuant to Fed. R. Crim. Proc. 29. Nonetheless, the court allowed the case to go to the jury for consideration.

Although Defendant had previously indicated he would testify, he did not. During Pereira's cross-examination, the prosecutor while attempting to attack Pereira's credibility, asked the question at issue here. Looking at the totality of the circumstances in this case, the court must conclude that the jury would necessarily view the question as an impermissible comment upon Defendant's failure to testify. Finally, because this case was based almost totally on circumstantial evidence, the court cannot conclude that the prosecutor's comment was harmless.

III. CONCLUSION

Based upon the foregoing discussion, the Government's Motion for Reconsideration is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of October, 1992.

/s/ Donald L. Graham
Donald L. Graham
UNITED STATES DISTRICT JUDGE

---

[4] Pereira entered a plea on both counts of the indictment in November 1991.

[Filed Sept. 11, 1991]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ.

No. 91-0670 CR-RYSKAMP
21 USC 841(a)(1)
21 USC 846
18 USC 2

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about March 30, 1991, to on or about September 5, 1991, at Dade County, in the Southern District of Florida, and elsewhere, the defendants,

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title

21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about September 5, 1991, at Dade County, in the Southern District of Florida, and elsewhere, the defendants,

JOSE LUCIO PEREIRA-GARCIA,
a/k/a "Pepe",

and

CEASAR HERNANDEZ,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Jeremiah Smith
JEREMIAH SMITH
FOREPERSON

/s/Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

JOSE PEREIRA GARCIA,
a/k/a "Pepe",

Case No. 91-670-Cr-GRAHAM

UNDER SEAL

GOVERNMENT'S MOTION FOR SENTENCING DEPARTURE PURSUANT TO RULE §5K1.1 OF THE SENTENCING GUIDELINES

The United States of America, by and through its undersigned counsel, hereby moves this Honorable Court to depart from the sentencing guidelines applicable in this matter as provided in Rule § 5K1.1 of the Sentencing Guidelines, entitled "Substantial Assistance to Authorities," and in support thereof, states as follows:

1. On September 11, 1991, a two-count indictment was returned by the Federal Grand Jury charging defendant with conspiracy and possession with intent to distribute cocaine in violation of Title 21, United States Code, Sections 841 and 846.

2. On November 27, 1991, defendant entered into a plea agreement, whereby defendant agreed to plead guilty to both counts of the indictment. Defendant further agreed to cooperate with law enforcement authorities.

3. Defendant has provided valuable assistance to agents of the Drug Enforcement Administration, the United States Customs Service, and detectives of the Metro Dade Police Department, the substance of which will be explained to the Court at the time of sentencing.

WHEREFORE, for the above reasons, the United States requests that this Court depart from the applicable sentencing guidelines range, and sentence defendant Jose Pereira Garcia to a term of incarceration less than that prescribed by the sentencing guidelines. Also, the United States requests that this Motion and all pleadings pertaining thereto be sealed by this Court.

Respectfully submitted,

ROBERTO MARTINEZ
UNITED STATES ATTORNEY

By: /s/ Christopher J. Clark
CHRISTOPHER J. CLARK
ASSISTANT UNITED STATES ATTORNEY
FLORIDA BAR #588040
(305) 536-4833

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 26th day of June, 1992 to Jose Martinez, Esq., counsel for defendant.

/s/ Christopher J. Clark
CHRISTOPHER J. CLARK
ASSISTANT UNITED STATES ATTORNEY